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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 674

AUTOMOBILE TRANSPORTERS WELFARE FUND and WALTER F. CAREY, DENTON BOLEY, E. I. HAND, JAMES R. HOFFA, CHARLES E. BONI and WILLIAM R. WALSH, Trustees of AUTOMOBILE TRANSPORTERS WELFARE FUND,

Petitioners

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION

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New York Court Opinions

In the New York courts, this case is reported at 34 Misc. 2d 907, 228 N.Y.S. 2d 907 (1962), reversed 17 A. D. 2d 448, 235 N.Y.S. 2d 702 (1962), aff'd 13 N. Y. 2d 814, 242 N.Y.S. 2d 345 (1963).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

The supervision and regulation of labor-management welfare funds by the Insurance Department of the State of New York, under Insurance Law, Article III-A are expressly exempted from federal preemption by the provisions of The Welfare and Pension Plans Disclosure Act of 1958 (29 U.S.C. Sections 300 *et seq.*) and the McCarran Act (15 U.S.C. Section 1011). New York provides for audit of the funds and requires reimbursement by the fund of the expense of the audit, subject to statutory exceptions and exemptions. The New York courts passed on the objection by petitioners-trustees that the audit and the request for reimbursement were precluded by Labor-Management Relations Act of 1947. The only question presented here by petitioners is whether the provision for reimbursement of the actual reasonable expense of the audit was in conflict with the LMRA of 1947, the petitioners expressly conceding that the State had the authority to make the audit.

Constitutional and Statutory Provisions Involved

The provisions of Article III of the Constitution are set forth in Appendix "E" to the petition, pages 30-31. The provisions requiring reimbursement for the audit are contained in Section 37 of Article III-A of the New York Insurance Law and are set forth in Appendix "F" to the petition, page 32. By an amendment to that section (L. 1959, c. 645, eff. April 21, 1959), the Superintendent was authorized "in his discretion for good cause shown [to] remit or reduce such charges." The amendment, furthermore, provided a statutory ceiling, reading as follows:

> "(1) for funds with contributions of less than thirty thousand dollars, as reported in the annual statement filed with the superintendent for the latest fiscal year covered by the examination, the charge shall not exceed three hundred dollars,

(2) for funds with contributions between thirty thousand dollars and one hundred fifty thousand dollars the charge shall not exceed one per cent of such contributions."

Other relevant provisions of the Insurance Law, Article III-A are set out in Appendix "1", *infra*, at page 12. The relevant provisions of the Welfare and Pensions Plans Act of 1958 are set out in Appendix "2", *infra*, at page 13.

The enactment by the State of Article III-A followed several state inquiries into irregularities in such funds. The first inquiry resulted promptly in the amendment of the Insurance Law to specifically provide for examination of such employee welfare funds. This amendment was regarded as stop-gap legislation and was repealed when the comprehensive regulatory plan set out in Article III-A was enacted in 1956.

The report of the first inquiry had explained recommendation for examinations "for the protection of the beneficiaries of the plan" as follows (pp. 147-148):

> "The Department's field investigations revealed that one of the most significant deficiencies in the operation of welfare plans was a lack of proper administrative procedures, including the failure to maintain adequate records. The trustees should be responsible for the maintenance of adequate records, books and accounts, in conformity with generally accepted accounting principles. This will not only facilitate the work of examination, but should also bring about needed improvement in the operations of the plan." (1954 Report Union and Employee Welfare Funds in New York, Ins. Dept., pp. 145-149.)

The comprehensive regulatory plan set out in Article III-A was preceded by a further departmental inquiry. The second inquiry resulted in a 1956 Report by Martin S. House, Special Counsel to the then Superintendent. The

following pertinent language appeared (at p. 18).

> "Comprehensive regulation is common in situations where a fiduciary relationship exists. In the case of insurance companies and banks, where the individual savings of many are concentrated in and controlled by a relatively few large institutions, the State has seen fit to extend its authority in the public interest. The accumulation of billions of dollars in welfare and pension funds intended for the benefit of working people has created a comparable situation and a comparable need for State supervision. The beneficiaries of these funds are many; their separate means are small. They do not have the time, the knowledge or the financial resources to protect themselves.
>
> "Moreover, Congress and state legislatures, recognizing the broad social benefits that accrue from welfare and pension plans, have granted them special tax exemption privileges. The acceptance of such privileges carries with it an obligation to account to the public for the stewardship of these funds."

At page 25, the following comment also appears:

> "The power of visitation and the actual inspection of the records and documents of employee benefit plans are essential to supervision. Through periodic examination, the Superintendent is able to determine the accuracy of the reports submitted to him, such as the registration data and the annual statement. Moreover, the affairs and financial transactions of the plan can be scrutinized at first hand.
>
> "The power proposed here is analogous to that now vested in the Superintendent in relation to insurance companies. This time-tested procedure has been of inestimable value in bringing to light significant information on the affairs and conditions of insurance companies of which the Superintendent and the public would not otherwise be aware."

Statement of the Case

The petitioners' statement in order to convey a full understanding should be supplemented by the following facts and statutory background:

The petitioners *registered* the Fund with the New York Superintendent of Insurance in accordance with Article III-A of the New York Insurance Law. That Article, in section 37-c, provides for examinations of these bilateral welfare funds once every *five* years. In 1958 the Superintendent caused such an examination to be made of the financial affairs of the Fund and pursuant to section 37-f, (Appendix "F") requested reimbursement for the actual cost of such examination as certified by the Comptroller of the State of New York.

The trust indenture which set up the operation of petitioners' Fund explicitly provides that "the Welfare Fund will be administered jointly by Employers and Union, in compliance with all applicable laws, rules and regulations both State and Federal." Nevertheless, the trustees failed to pay with the resulting civil action by the State for such reimbursement.

The provisions of section 37-f are substantially identical with existing provisions of the Insurance Law which have been in effect for more than seventy-five years. Section 32 contains provisions for reimbursement of the cost of examination similar to that in section 37-f. The examinations conducted under section 32 have included organizations similar to petitioner doing business in this State. The examination may be a basis for a subsequent liquidation order or other action specified in Article III-A to protect the beneficiaries of these funds from its depletion.

Among the pension plans and retirement systems which have been subject to such reimbursement for the cost of examination are the New York City and New York State

Retirement Systems, the New York State Board of Education Retirement System, the New York State Teachers Retirement Systems and the New York City Policemen and Firemen Retirement Systems. The beneficiaries of these funds are of equal concern to New York State as are those of petitioners and it is universally recognized that the payment of the reasonable expense of the audit of these funds by a state agency is a necessary expense as would be the payment of accounting fees, rent, attorney fees and the like.

The New York Act, as was the federal legislation, was enacted "to protect the rights of employees and their families, without imposing burdens upon such funds which might discourage their orderly growth" (Ins. Law section 37; Appendix "1", p. 12); that financial examinations are stipulated "once in every five years" (section 37-e); the charge for examination is only for actual reimbursement determined after audit by the State Comptroller of the cost to the State and that the Superintendent may, upon application, reduce as well as remit entirely such charge (section 37-f). Refusal is subject to judicial review.

Furthermore, under section 37-k (Appendix "1", p. 12), New York has dealt with the situation where the federal government or any other state has provisions for "registration, filing, examination, statements or reports." In such case, compliance with similar requirements by New York may be waived by the Superintendent. Here, too, refusal by the Superintendent is subject to judicial review.

No such application for waiver of the audit was made by petitioners. No other state (or the federal government) has made or indicated any intention to make any examination of the Fund. Indeed, there are only five states with *any form* of welfare fund supervision. Wisconsin and Connecticut are the only states, other than New York, to have a statute providing for examinations at the ex-

pense of the funds. (See Wisc. Stat. Ann., Title 17, ch. 211; Conn. Rev. Stat., Title 31, sections 31.78 to 31.89.) There is no claim that Wisconsin or Connecticut has conducted or intends to conduct any examination of the Fund. (Connecticut has never had any examination of any welfare fund, according to information supplied by the Department of Insurance.) So that it is apparent that the only possible reason for the petition here is not the fear of any duplication in examination or in the requirement for reimbursement but actually to hobble effective regulation and supervision by anyone over the financial affairs of these funds.

Congress, too, has given deep consideration to these bilateral welfare funds. Bearing in mind that such funds, as conceded by petitioners in their brief in the New York Court of Appeals, when created, become trust and insurance funds and require "the application of principles of trust and insurance law" and therefore become subject to state law (15 U.S.C. section 1011, the "McCarran Act"), Congress in enacting the Welfare and Pension Act of 1958 (29 U.S.C., 300, *et seq.*), expressly provided for continued state regulation and supervision (Appendix "2", p. 73).

Congress sought thereby to invite more effective state regulation. This is also indicated by Senate Report No. 1440, April 21, 1958 (as reported in U. S. Code Congressional and Administrative News, 85 Congress, Second Session, 1958, Vol. III, p. 4153):

> "There is no desire to get the Federal Government involved in regulation of these plans but a disclosure statute which is administered in close cooperation with the States could also be of great assistance to the States in carrying out their regulatory functions."

and again in the Final Report of the Committee on Labor and Public Welfare, submitted by the subcommittee on

Welfare and Pension Funds (reported in Sen. Misc. Reports on Public Bills, Vol. 11887, at p. 8):

> "Disclosure of the workings of the Welfare and Pension Plans to a Federal agency is a mild remedy, *reserving to the States a wide area for additional control.* **There is much room in fact, at the State level for enactment of legislation designed to more clearly fix the responsibilities of trustees and to strengthen insurance regulations."** **(Emphasis supplied)**

The Lack of Any Substantial Basis in the Case as Presented by Petitioners

I

As we have pointed out, petitioners have conceded the state's right to make the audit. Once petitioners recognize and concede the right of the Insurance Department to audit the records of petitioners as provided for by the state law, the requirement for the payment of the reasonable expense of such audit presents no federal question.

It is unfounded to suggest that the existence of any such administrative expenses of the funds constitute an interference with the "solution worked out by the parties [as to wages and working conditions]" expressed in *Teamsters Union* v. *Oliver*, 358 U. S. 283, 321 (1959), or that it "impairs, dilutes, qualifies or in any respect subtract from any of the rights guaranteed and protected by the Federal Act," language used in *Allen Bradley Local 1111* v. *Wisconsin Board*, 315 U. S. 740, 750, both cases relied upon by petitioners (br., p. 5). On the contrary, it is in recognition of the absence of federal preemption that the trust indenture here was made subject by the parties to all applicable state laws.

The effort to avoid this conclusion by contending that the Fund might be subjected to the expense of audit by

more than one state is fanciful, but even then New York in section 37-f provides for remission of the entire charge and in section 37-k for dispensing with the audit in such cases. Denial by the Superintendent in each instance would be subject to judicial review in the Courts of New York.

Moreover, the expense of the audit covering a five year period is minimal and the request for reimbursement to the state does not involve the question of whether the trustees, in their own bookkeeping, should charge the expense to the New York beneficiaries or spread it out over all the beneficiaries of the Fund, who benefit from audit by the only governmental authority exercising such protection at this time. Cf. *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313 (1943); *Matter of Union Insurance Agency, etc. v. Holz*, 1 A. D. 2d 945, 151 N.Y.S. 2d 926 (1956), app. dism. and lv. to app. den. 1 N. Y. 2d 921, 136 N. E. 2d 919 (1956), app. dism. 353 U. S. 932.

The provisions of section 37-f of the Insurance Law have no effect on the collective bargaining agreement. New York is concerned only with the welfare and protection of the beneficiaries of the insurance benefits already agreed upon and incorporated in the trust indenture drawn as a result of the collective bargaining. The State is dedicated to the purpose of insuring that this trust is honestly administered. *The expense of the audit is no more than the other expenses of the administration of these funds,** whether they act as self-insurers or purchase insurance contracts from insurance companies.

II

As the opinion of the New York Appellate Division points out, Congress has gone as far as it could to insure

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* The financial information filed by the Fund with the Superintendent indicates that the Fund's expenses for accounting, legal, salaries and rent alone amounted to $51,650 in 1963 and somewhat less sums for the years 1961 and 1962.

that the form of regulation by the states of these funds should not be interfered with either on the theory of federal preemption or otherwise. The Welfare and Pension Plans Act not only precludes by its express terms the claim of preemption but also explicitly provides for the continuance of this responsibility by the State of these funds. The Appellate Division discussed the Congressional history of the statute which demonstrated this intent of Congress (App. "C", p. 20). The Court cited *DeVeau* v. *Braisted*, 363 U. S. 144 (1960) and *Matter of Thacher (United Construction Workers)*, 10 N. Y. 2d 439, 180 N. E. 2d 245 (1962), which are fully applicable here.

Paraphrasing this Court's statement in *Retail Clerks* v. *Schermerhorn*, ——— U. S. ———, 11 L. Ed. 2d 179, 182 (1963), it would be odd for Congress to expressly permit the state to exercise its traditional supervision and regulation over these funds, including the right of audit, but to bar the state from enforcing its own law requiring reimbursement for the actual expense of the audit, especially in a situation (at p. 184) "where Congress gives state police that degree of overriding authority."

III

Moreover, as petitioners recognized in their New York Court of Appeals brief (p. 13), the Fund is subject to the insurance laws of the states. The states have a deep, well recognized primary interest which has been similarly recognized by the McCarran Act (15 U.S.C. Section 1011). *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 431 (1946); *California* v. *Zook*, 336 U. S. 725, 729 (1949). There is no support for any contention that Congress in enacting LMRA intended to override the states' historic and traditional regulation and supervision of these insurance funds by the state Superintendent of Insurance, including the traditional provision for reimbursement of the cost of the audit.

Appropriate here is the statement in *Florida Lime & Avocado Growers v. Paul*, 373 U. S. 132, 10 L. Ed. 248 (1963), where the Court referred to the subject there under discussion as "of the kind this Court has traditionally regarded as properly within the subject of state superintendence" (10 L. Ed. at p. 258).

IV.

This Court has traditionally upheld the right of the states to provide for reimbursement. *Charlotte, Columbia and Augusta R. R. Co. v. Gibbes*, 142 U. S. 386, 394 (1891); *McLean v. Denver & Rio Grande R. R. Co.*, 203 U. S. 50, 55 (1906); *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345 (1897).

The audit by New York of these funds—all agree—is a necessary activity and indispensable safeguard for the benefit of the beneficiaries. The provision for reimbursement is a reasonable provision by the state in the furtherance of this activity and will in no wise interfere with or impair the collective bargaining contract. No substantial federal question exists.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, New York, January 10, 1964.

Respectfully submitted,

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APPENDIX "1"

New York Insurance Law

37. Declaration of policy.

It is hereby declared to be the policy of the state that employee welfare funds are of great benefit to employees and their families and that their growth should be encouraged; that the establishment and management of such funds vitally affect the well-being of millions of people and are in the public interest; and that such funds should be supervised by the state to the extent necessary to protect the rights of employees and their families, without imposing burdens upon such funds which might discourage their orderly growth and without duplicating the supervisory responsibilities presently vested in any state agencies.

37-k. Regulation under other laws.

Where the trustees of any employee welfare fund are subject to and comply with the requirements of any law of this state other than this article or the law of any other state or of the United States with respect to registration, filing, examination, statements or reports, such requirements of this article or any of them may be waived by the superintendent with respect to any such fund or trustees to the extent that they are included in such other laws. Application for such a waiver shall be made in writing to the superintendent on such forms as he may require and any waiver issued by him hereunder shall be in writing and shall be filed in his office. The superintendent may, at any time, revoke any such waiver if, in his opinion, such other laws fail to accomplish adequately the purposes of this article. The action of the superintendent pursuant to this section shall be subject to judicial review.

APPENDIX "2"

Welfare and Pension Plans Act of 1958 (29 U.S.C.)

§ 309. Effect of other laws—State laws

(a) In the case of an employee welfare or pension benefit plan providing benefits to employees employed in two or more States, no person shall be required by reason of any law of any such State to file with any State agency (other than an agency of the State in which such plan has its principal office) any information included within a description of the plan or an annual report published and filed pursuant to the provisions of this chapter if copies of such description of the plan and of such annual report are filed with the State agency, and if copies of such portion of the description of the plan and annual report as may be required by the State agency, are distributed to participants and beneficiaries in accordance with the requirements of such State law with respect to scope of distribution. Nothing contained in this subsection shall be construed to prevent any State from obtaining such additional information relating to any such plan as it may desire, or from otherwise regulating such plan.

Present or future Federal or State laws.

(b) The provisions of this chapter, except subsection (a) of this section, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.